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NOTES

THE LIABILITY OF A CONSPIRATOR FOR UNEXPECTED MURDER.

The following instruction by the Court in a trial for murder of a co-conspirator was given in the recent case of *State v. Darling*, 115 S. W. Rep. 1002 (Mo., Feb. 2, 1909): "If you further believe from the evidence that the defendant went with his brother to the scene of the killing for the purpose of and the intention, if necessary, to aid, encourage, or to abet his brother in assaulting the deceased, but that the defendant did not know that his brother intended to use a deadly weapon in making such assault, and did not know of a felonious intent on the part of the brother, but understood at the time that it

was the purpose and intention of the brother merely to whip the deceased, yet the defendant is guilty of manslaughter." In this case death was caused by a blow struck by defendant's brother with a piece of iron which he had concealed in his hand.

The general rule undoubtedly is that, when several persons conspire or combine together to commit an unlawful act, and a homicide results, each is criminally responsible for the acts of his associates or confederates if committed in furtherance, or in prosecution of the common design for which they combined.¹ This general rule is not affected by the fact that homicide was not the result intended, or within the contemplation of the parties as a part of the original design.² And at least one court has gone to the extent of holding that it is no defence that the defendant forbade his associates to kill, or that he disapproved of the killing, or regretted that any person was killed, if, in fact, the killing was committed in the furtherance of the common design.³ Another court has held the defendant liable for the homicide committed by his associate when done in furtherance of the common design, though it was agreed that no killing was to be done by either party.⁴ The basis of these decisions is that where one person combines with another to do an unlawful act, he impliedly consents to the use of such means, by his confederate, as may be necessary or usual in the successful accomplishment of the act, and if such means involve or result in a homicide, he is criminally liable.⁵

As to just what the true test is in cases of this character is not quite clear. It is clear that when the common design is to effect death, the means employed is of no consequence, for all are guilty if death result.⁶ The same rules would seem to be applicable in all cases where the object of the common design

¹ *Martin v. State*, 136 Ala. 32; *People v. Oleson*, 80 Cal. 122; *Butler v. People*, 125 Ill. 641; *State v. Morgan*, 22 Utah, 162; *Com. v. Campbell*, 7 Allen, 541; *State v. Johnson*, 7 Ore. 210; *Weston v. Com.*, 111 Pa. 251; *Com. v. Miller*, 4 Phila. 195; *Blain v. State*, 30 Tex. App. 702; *Hays v. State*, 112 Wis. 304; *U. S. v. Ross*, 1 Gall. 624.

² *Evans v. State*, 109 Ala. 22; *Carr v. State*, 43 Ark. 99; *People v. Vasquez*, 49 Cal. 560; *Spies v. People*, 122 Ill. 1; *State v. Walker*, 98 Mo. 95; *Com. v. Mayor*, 198 Pa. 290; *Mitchell v. State*, 136 Tex. Crim. Rep. 278.

³ *People v. Vasquez*, 49 Cal. 560.

⁴ *State v. Johnson*, 7 Ore. 210.

⁵ *Williams v. State*, 81 Ala. 1; *Lamb v. People*, 96 Ill. 73.

⁶ *People v. Lagroppe*, 90 App. Div. 219; *Carpenter v. State*, 62 Arch.

is to do acts of personal violence of such a nature as likely to cause death. So where several persons enter into a conspiracy to assault and beat another, and in carrying out such conspiracy the other is killed, each will be criminally liable therefor.⁷ The reason given in these cases is that when people assemble themselves together with an intent to commit an unlawful act, the execution of which makes probable, in the nature of things, the commission of another crime which is incidental to that which is the object of the conspiracy, they are responsible for such incidental crime. The courts have applied the same rule also in conspiracies that have for their common object the invasion of property rights, such as to commit larceny, burglary, robbery, etc.;⁸ or where the common design is to escape from confinement.⁹

In all the cases there must be shown a conspiracy or concert for the purpose of effecting a common design; and in order that the party not committing the act shall be criminally responsible for the act of his co-conspirator, the act of the co-conspirator must be one within the scope of the common design or purpose. The generally adopted test is, Did the parties act together, and was the act done in pursuance of the common design and purpose in which their minds had agreed?¹⁰ The real difficulty comes in determining just what are and what are not acts within the common design. Shall the court restrict the rule so as to include within the scope of the design only those acts actually contemplated, or shall it be extended to include also all the proximate, natural and logical consequences of the execution of the common design? The latter seems to be the generally accepted rule.¹¹ The act is generally held to be within the scope of the common design if it is the ordinary and probable effect of the wrongful act contemplated, so that the connection between the acts is reasonably apparent,

286; *Anon. v. People*, 31 Colo. 351; *Com. v. Neills*, 2 Brewst. (Pa.) 553; *Holtz v. State*, 76 Wis. 99; *Reg. v. Price*, 8 Cox. C. C. 96.

⁷ *Gibson v. State*, 89 Ala. 121; *Williams v. State*, 81 Ala. 1; *State v. Freeney*, 41 Kansas, 115; *Peden v. St.*, 61 Miss. 267; *Reg. v. Price*, 8 Cox C. C. 96.

⁸ *State v. Cannon*, 49 S. C. 550; *Hamilton v. People*, 113 Ill. 34; *Com. v. Mayor*, 198 Pa. 290; *Mercersmith v. State*, 8 Tex. App. 211.

⁹ *People v. Wilson*, 145 N. Y. 628; *People v. Flanigan*, 174 N. Y. 357; *State v. Allen*, 47 Conn. 121.

¹⁰ *Com. v. Campbell*, 7 Allen, 541; *Butler v. People*, 125 Ill. 641; *Powers v. Com.*, 110 Ky. 386; *King v. Plummer*, 12 Mod. 627.

¹¹ *Tanner v. State*, 92 Ala. 1; *Lamb v. People*, 96 Ill. 73; *U. S. v. Boyd*, 45 Fed. 851

and the act in question is not a fresh and independent product of the mind of the confederate outside and foreign to the common design.¹² This question is one for the determination of the jury.¹³

While it is quite impossible to lay down any definite and hard rule as to just when a homicide results from the pursuit of the common design; yet, the cases accord that a homicide resulting from a personal assault with deadly weapons, or which is likely to cause the use of deadly weapons, is an act within the scope of the common design.¹⁴ When the conspiracy is to commit some minor offense in the execution of which the use of deadly weapons is not contemplated, nor can it reasonably be expected that they will be used, the use of such dangerous weapons cannot be deemed within the common intent and design of the parties. Thus, one who conspires with another to commit a mere misdemeanor, such as an assault with hands and fists, not dangerous to life, is not liable for the homicide, where the other uses weapons dangerous to life and kills the party assaulted.¹⁵ This rule is not applied in a case, however, where the conspiracy was to fight with fists, and the death was caused by a blow with the fist, the killing in such case being the direct result of the conspiracy.¹⁶ In general the cases support the rule that, where a number of persons enter into an agreement to commit a criminal act, in the execution of which a person is killed by one of them, all who enter upon the commission of the criminal act and continue in its execution up to the time of the killing are guilty of the murder, provided the act to be done is one which, from its nature, or the way in which it is to be executed, may jeopardize or be dangerous to life, or is itself homicidal in character.¹⁷

It is hard to see how, under any of the better decided rules, a conviction can be had in a case where the co-conspirators have beforehand expressly agreed that the use of dangerous weapons shall not be resorted to and death result from the use

¹² *Williams v. State*, 81 Ala. 1; *State v. Walker*, 98 Mo. 95.

¹³ *Martin v. State*, 136 Ala. 32; *Frank v. State*, 27 Ala. 37; *People v. Holmes*, 118 Cal. 444; *Powers v. Com.*, 110 Ky. 386.

¹⁴ *Kirby v. State*, 23 Tex. App. 13; *Bibby v. State*, 65 S. W. 193; *Ferguson v. State*, 134 Ala. 63; *Reg. v. Price*, 8 Cox C. C. 96.

¹⁵ *Powers v. Com.*, 110 Ky. 386; *Mercersmith v. State*, 8 Tex. App. 211; *Brown v. State*, 28 Ga., 199; *State v. May*, 142 Mo. 135.

¹⁶ *Reg. v. Caton*, 12 Col. C. C. 624.

¹⁷ *U. S. v. Boyd*, 45 Fed. 851; *Com. v. Neills*, 2 Brewst. (Pa.) 553; *Miller v. State*, 15 Tex. App. 125; *Holtz v. State*, 76 Wis. 99.

thereof. Such a conviction has been supported.¹⁸ It can hardly be said as a matter of law that an act was done in pursuance of the common intent, if the parties have agreed that such act shall not be done. It might well be that such would be a proper question for a jury to consider and determine whether the expressed intent was in fact the real intent of the parties. At least to secure a conviction of murder in the first degree where premeditation and deliberation to kill must be affirmatively proved by the Commonwealth, it would seem to be error to hold as a matter of law that a party to a conspiracy was liable in that degree for a crime against which he has remonstrated.

LIABILITY FOR INJURY BY CONTACT WITH LIVE WIRE.

Negligence has often been defined as the absence of due care under the circumstances.¹ And it is quite well-established that he who alleges negligence on the part of another must show that there was from that other a duty owing him, the breach of which duty constitutes the negligence alleged.² Therefore, where there is no duty owing, there can be no negligence. It is on this ground that the occupiers of real property, although careless in the use of that which is on their land, are excused for injuries caused to trespassers as the result of such carelessness.³

In the case of infant trespassers, many jurisdictions make some exceptions, as in what are known as the "turntable cases," where infants, although trespassers, have been allowed to recover damages for injuries sustained while meddling with dangerous machinery on the land of the defendants, the courts holding that the latter were bound to guard against such trespassers.⁴

A slightly different question often arises where the injury occurs through the carelessness of the defendant, but not on his property. Such was the situation in *Mullen v. Wilkes-*

¹⁸ *People v. Vasquez*, 49 Cal. 560.

¹ *Turnpike Co. v. Railroad Co.*, 54 Pa. 345.

² *Heaven v. Pender*, 11 Q. B. D. 503.

³ *Brady v. Prettyman*, 193 Pa. 628.

⁴ *R. R. v. Stout*, 17 Wall. (U. S.) 57.